No. 2523

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN HEGNESS,
Appellant,

vs.

EUGENE CHILBERG,
Appellee.

BRIEF FOR APPELLEE.

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By.....Deputy Clerk.

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Statement of the Case.

Appellant's statement of the case is very ingenious and rather misleading.

The plaintiff and the defendant in August, 1909, at Nome, Alaska, entered into the written agreement set forth in plaintiff's complaint (Tr. page 2).

At that time the defendant, Hegness, hereinafter referred to as the appellant, was living in Nome, the owner of a dog team, sled, and equipment, necessary and ordinarily used in carrying mail over the trails of that country. The plaintiff in the Court below hereinafter referred to as the appellee,

had just retired from the banking business in Nome, and had financial credit both in Nome and Seattle.

The appellant was desirous of entering into an agreement of partnership to obtain the mail contract with the United States in order to get employment during the winter season, which lasts from November until June.

It was contemplated at the time of entering into the agreement that the appellee should leave for Seattle at considerable expense, where it was necessary to go to obtain the necesasry bonds required by the United States Government for the mail contracts. The partnership contract was entered into on the twenty-fifth day of August, 1909, at Nome, Alaska, and very shortly thereafter the appellee left for Seattle. The appellant about the same time, or shortly thereafter, at Nome, filled out the required applications and submitted bids for said mail routes mentioned in said contract. The appellee at Seattle arranged the necessary bond required by the Government, and thereafter, in due time, the said contract was let by the postal authorities for a term of four years at sixteen thousand dollars per year, or sixty-four thousand dollars for the term (see Tr. page 4). Under the terms of said mail contract, the United States mail was to be carried between Nome and Unalakleek, Alaska, each winter between November 1st and June 1st, or a period of six calendar months.

There is nothing in the transcript that even intimates, nor was there ever any lobbying or use of

influence, or any effort to stifle or prevent bidding in any manner whatever, done by either the appellee or appellant.

After the contract was obtained in accordance with the terms of the partnership agreement, the appellee advanced certain funds to the appellant to commence carrying the mails under the contract for the Government. He arranged a line of credit with the Pacific Cold Storage Company, a business and financial institution in the town of Nome, Alaska, where the said appellant could obtain all the funds necessary to employ and pay the necessary mail carriers and other expenses.

All of these arrangements were well known to the postal officials (Tr. page 40), and no arrangement, agreement, or understanding was ever had or entered into between the appellant and appellee to keep the knowledge of appellee's interest in the contract from the Government officials.

There is not a scintilla of evidence in the transcript that there was any collusive understanding between Hegness and Chilberg to keep the information from the officials except some inferences in the answer filed after the Court rendered its opinion. At all times during the four years of said contract was the said Chilberg in constant communication with the postal officials, and they knew that the said contract was taken in the name of Hegness for himself and Chilberg.

Appellant and appellee conducted their business during the first two years—1911 and 1912—(see Exhibits A and B, Tr. pages 43 and 44) satisfactorily and without any trouble or complaint on the part of either. At the end of the third year, 1913 (see Exhibit C, Tr. page 45, and Tr. page 11), Hegness appropriated from the partnership funds the sum of eighteen hundred dollars, which, as he evidence shows, Chilberg (who was living in Los Angeles, California) did not learn until late in the winter of 1913, or the spring of 1914. Exhibit D (Tr. page 46) shows the statement for the last year, or 1914, of the contract.

The plaintiff commenced this suit on the third day of July, 1914, filing his complaint, verified by his attorney, together with the affidavit of his attorney, as the appellant was then living in Los Angeles, and the suit was commenced at Nome.

On the sixteenth day of July, the defendant filed his affidavit (Tr. page 14) claiming that the contract set out in the complaint was void on its face, and defending against the injunction for the warrants for the excess mail, and on the same day filed a general demurrer to the complaint (Tr. page 13). After argument the case was submitted to the Court on the defendant's demurrer to the plaintiff's complaint and plaintiff's motion for an injunction *pendente lite,* and thereafter, on the twelfth day of September, 1914, the Court entered and filed its written opinion (Tr. page 56) overruling the demurrer and granting the injunction *pendente lite.*

Thereafter on September 15, 1914 (Tr. page 28), the defendant filed his answer to plaintiff's complaint, together with an affidavit and a motion to vacate the injunctional order, or to at least modify the same (Tr. page 33). Counter affidavits were filed by the attorney for appellant, together with a reply to defendant's answer, which has been inadvertently omitted from the transcript, and also a motion for a receiver. After argument on the law, the Court entered its two certain written orders appealed from by the appellee (Tr. pages 52 and 53).

Specifications of Error.

Briefly stated, the appellant makes the same assignments of error on the appeals from both orders, to wit: That the Court erred in entering said orders for the reason that the complaint does not state facts sufficient to constitute a cause of action, and that the contract upon which this suit is based is void on its face, and is contrary to the statutes of the United States, and void, and contrary to the regulations of the Post Office Department of the United States, and, consequently against public policy and void, and also that the suit was prematurely brought by the plaintiff (Tr. pages 8, 9, and 10).

The Court will notice by reading the specifications of error that appellant relies solely, so far as this appeal is concerned, on his attack upon the

contract itself, abandoning all facts set up by an affidavit or answer. In other words, the appellant by his assignments of error has asked this Court to determine from the four corners of the contract itself, regardless of everything else in the transcript, whether the said contract is void and against public policy or not. So that if this Court decides that the contract is not illegal or against public policy, it naturally follows that the appellant has abandoned or waived his right under his assignments to complain that the plaintiff was not entitled to have granted both of said orders. In other words if the contract is legal and not against public policy it is conceded we are entitled to the relief granted by both orders.

Argument.

In order to fully grasp and understand the line of distinction between the cases cited by appellant in his brief, and relied upon by him, and the line of cases relied upon by appellee, we deem it expedient at this time to first discuss the facts disclosed in the record, and particularly the terms of the contract in dispute. Owing to the fact that the appellee was absent from Alaska and living in Los Angeles, it was impossible to obtain his version of the facts by affidavit, and in this action the appellee was compelled to rely upon the agreement and the showing made by his counsel from exhibits.

Of course, if the case is tried on its merits, the appellee will have an opportunity to testify in detail on any disputed question pertaining to the securing or carrying out of said contract, but enough appears from the contract and the affidavits in the transcript to show the Court that at the time the said agreement between appellant and appellee was entered into, the appellant had no financial standing, and had no assets other than a physical training and equipment, together with his dog team, and his personal ambition to have a winter season's employment at a good salary.

A casual glance at the financial exhibits in the transcript, A, B, C, and D (Tr. pages 43-46), will show to the Court that Hegness received for his work each winter from November first to June first, a period of six months, a princely salary greater than that received by most bank presidents. In 1911, the first year, he received thirty-six hundred dollars wages, four hundred dollars for extra team hire, six hundred dollars and sixty-five cents for his fifteen per cent of the profits, and subsequently placed his hand in the partnership pocket and extracted twenty-four hundred dollars more, or six hundred dollars per year. In the second winter, 1912, he received practically the same sums. In the third winter, his salary and expenses were all raised by himself, having a luxury of twenty-seven dollars for Christmas cigars. In the fourth and final year, his expense account was padded to such an extent that there was practically no profit left

(Tr. page 41). The appellant in his brief complains of the lack of equity in the division of the profits of the contract, fifteen per cent to appellant and eighty-five per cent to appellee.

The appellee put up the expenses of his own trip from Nome to Seattle in the fall of 1909, where he went specially to arrange to give the necessary bonds that could not be obtained in the town of Nome, Alaska, and in addition thereto, obtained through the aid of his influential friends in Seattle a line of credit with the Pacific Cold Storage Company by guaranteeing the payment of any moneys advanced to the partnership during the four years. This line of credit was so arranged that Hegness could go to the Pacific Cold Storage Company at any time and obtain any amount of money needed or necessary in the business.

A glance at Exhibit D (Tr. page 46) will show the Court how extensive and agreeable a financial arrangement had been made through the financial standing of the appellee.

Chilberg was financially liable for every act performed by Hegness. He and his endorsers to the Cold Storage Company have had to make good, since the suit was instituted, the balance of the expense account for the last year. Instead of the contract being inequitable, the way the operations were conducted by Hegness, particularly in the last year, Chilberg had far the greater risk of loss. Hegness had a good winter's job in a land where profitable employment was very scarce.

The question of whether or not the contract was or was not equitable certainly cannot be raised on this appeal without all of the facts being properly before the Court.

In construing the contract (Tr. page 2) which this Court is now called upon to say, by reason of its plain language is or is not against public policy and void, we ask the Court first to consider the language of the contract before applying the law. The parties to the contract expressed their intentions very clearly before stating in the contract the terms and covenants each was to keep and perform. The intention of the parties is expressed in the contract in the following language:

> "The parties * * * are desirous of securing a mail contract to carry the United States mail from Nome to Unalakleek * * * are desirous of bidding upon proposals * * * in the name of the party of the second part."

The Court will notice here that there was no intent expressed or otherwise on the part of either appellant or appellee that the appellant Hegness was not to disclose to the post office officials in his bid that Chilberg was to be interested in the mail contract with him; simply that they were to bid and take the contract in the name of Hegness. Their further intent is expressed in the following language:

> "The parties are desirous of forming a copartnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained."

Nowhere in the contract is there the slightest intimation that there was any collusion or collusive attempt, secret or otherwise, to prevent or stifle bidding or to assign the mail contract. There is nothing in the transcript, in the affidavits, or exhibits that shows in the slightest particular that there was ever a thought or intent on the part of either the appellant or appellee to secretly or collusively mislead the post office officials.

When this case is tried on its merits, the evidence will undoubtedly show the fact that when Hegness filled out his printed application or bid at Nome, after Chilberg left Seattle to obtain the bond, that he inadvertently omitted to state that Chilberg was interested in the bid with him. It does appear, however, in the transcript, and is before the Court at this time that the post office officials at all times knew of Chilberg's interests and recognized him as being interested in the contract.

Counsel for appellant in his brief dwells at length upon the language and expression in the contract as follows (Tr. page 2):

> "That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above-mentioned, or either of them, and to that end, the party of the first part agrees to advance all necessary funds needed for said purpose."

This question is raised by appellant in his brief by innuendo and insinuation that Chilberg had in

some mysterious manner or way unduly influenced some official or had expended or intended to expend money unlawfully and illegally to obtain the said contract. No such issue was made before the trial Court nor is there one iota of proof in the transcript upon which to base such an insinuation or such a meaning to the language used in the contract. Had such an issue been raised at the injunction hearing, we certainly would have procured the affidavit of Chilberg to show what funds were indeed expended or intended to be expended at the time the agreement was drawn up; but it does appear in the transcript that Chilberg at great expense to himself under the terms of the contract, immediately departed for Seattle, where he arranged for the bond required for bidders paying or advancing $1200 for a bond.

We further call the Court's attention to the financial exhibits and statements in the record (Tr. pages 43-47) wherein every item of expense is given, and there is not the slightest suggestion in any of the items, that any funds were ever used or intended to be used, corruptly or otherwise, than as legitimate expenses in obtaining the contract and carrying out its objects.

We call the Court's attention to the fact that this was not an agreement that by its language in any way provided for compensation or payment by Hegness to Chilberg for obtaining or aiding him in obtaining the mail contract, nor has it the slightest resemblance to what is known as a contingent or

lobbying contract. It is plainly stated, and shows on its face to be a bona fide partnership between the two men to furnish the United States Government with a responsible bidder, and this is reenforced by the fact that clearly appears in the transcript that for four years the contract was strictly and carefully carried out between the parties and the United States Government.

The partners adjusted their accounts for the first two years of the partnership through their treasurer, the Pacific Cold Storage Company, and everything was satisfactory until the end of the third year, being the summer of 1913, when appellant violated the fifth covenant of the partnership in refusing to turn over certain postal warrants to the treasurer, the Pacific Cold Storage Company, but instead, cashed them at a local bank in Nome, Alaska, and appropriated therefrom arbitrarily, the sum of twelve dollars and fifty cents per trip for forty-eight trips per year. This, the Court will notice, was not done the first or second year, but at the end of the third year he appropriated eighteen hundred dollars, claiming it as extra compensation. When Chilberg heard of this during the last winter, he immediately took steps to persuade Hegness to carry out his agreement, which ended in a rupture between the partners, and this suit resulted.

This Court is not concerned at this time in any accounting between the partners, but can and must

consider all of these facts in shedding light upon the language and meaning of the contract to be interpreted. We have gone into the facts of this case at this time rather extensively in order to try to show the Court that nearly the whole of appellant's brief on the law is based on a misstatement or fallacious statement of facts.

The appellant in his brief argues the case to the Court under the following topics briefly stated:

1. The contract sued on is against public policy and void because its tendency is to prevent or diminish competition of bids.
2. The contract is a contingent or lobbying contract.
3. The contract is void under the Statutes of the United States, because it assigns the mail contract.
4. The contract sued on is void under the Statutes of the United States, because it assigns a claim upon the United States.

With the foregoing facts before us, let us now consider the fallacy of appellant's position on these four propositions.

We would have no quarrel with counsel on his statements of the law, or his authorities cited, if we would assume as he did a statement of facts not shown in the transcript, or if we read into the contract numerous intents and meanings or language not found therein or ever intended. A mere casual glance at the contract shows that it was not an

agreement to stifle or prevent bidding, and no stretch of the imagination would warrant anyone in calling the contract a contingent or lobbying contract, nor can we understand how counsel could possibly contend seriously to the Court that this agreement between Hegness and Chilberg was an assignment in any sense or manner whatever of any contract or claim against the United States. The contract shows on its face that it was not assigned but that Hegness was to go on the mail route as a carrier and as superintendent in charge of the work and the transcript shows he did do so.

It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, consequently, it must follow that in construing this contract, if nothing appears in the contract that shows in any manner or way that it is a lobbying contract, an assignment of the mail contract, or that it in any manner or way violates public policy, then the Court should affirm the lower Court.

In searching the contract for defects which appear upon the face which would invalidate it as being against public policy either by stifling bidding or lobbying, or in violation of a public statute as an assignment, the Court should not permit suggested meanings, surmises or insinuations to govern its interpretation.

When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 567;
Wharton on Evidence (2nd Ed.), Sec. 1250;
Lorillard v. Clyde, 86 N. Y. 384.

The illegality of a contract sued on must appear upon the face of the complaint.

Encyc. Plead. & Prac., Vol. VI, page 297, and cases cited under Note 4.

It is undoubtedly the law and not open to argument that a contract against public policy is illegal and cannot be enforced; but our contention is that the contract before this Court is not against public policy and should be enforced. This is where we disagree with counsel for appellant and where his law fails to fit the facts before the Court.

> "A contract should not be declared to be in contravention of public policy unless it is apparent that it controverts some public statute, or is against good morals, or that its tendency is to interfere with the public welfare or safety."

McCowen v. Pew, 21 L. R. A. (New Series) page 800.

The lower Court in its able opinion in the case at bar aptly stated the rule:

> "Every case must be determined from the particular facts involved or upon the facts as presented by the pleadings."

Given one set of facts certain law is applicable, while in another given set of facts the other rule of law applies. Throughout all the decisions cited by appellant and those hereinafter cited, the Court will readily see that there are two well defined lines of authority, and that the principles involved are clear cut and easily applied to a given statement of fact. If the Court assumes the facts to be as counsel for appellant in their brief assume, then we are willing to admit that appellant's statement of the law that a contract against public policy was illegal would apply, but if the Court adopts our view of the intent and meaning of the contract and the facts as stated herein, then we contend that the rule of law applies that an agreement that one shall bid for several for a public contract is not illegal *per se.*

Appellant in his brief has rested his case on practically two authorities, to wit:

> *Atcheson v. Mallon,* 43 N. Y. 147, and
> *Hoffman v. McMullen,* 83 Fed. 372 (affirmed in 174 U. S. 639), and the authorities cited and discussed in these two cases.

In all of the cases there is no better authority for the appellee than this same case of *Hoffman v. McMullen,* supra, under our contention of the intent and meaning of the contract in dispute and the facts surrounding the same. The two lines of decisions are cited, discussed, and distinguished by the Court in this case, and are so plainly stated that

we are somewhat surprised that the able counsel for appellant would have the temerity to claim this case as an authority under the facts in this record. The case of *Hoffman v. McMullen* was tried on its merits in the Court below, and the evidence disclosed that the parties submitted dummy bids, agreeing in advance of bidding on terms of their submitted bids, and it developed in the evidence that they used all kinds of improper means to defraud the City of Portland as evidenced by the following extract from McMullen's letter to Hoffman:

> "I do not want to let go on that submerged pipe; want to get the job. I think we can make $25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

Judge Hawley, speaking for the court, page 375, says:

> "The refusal of courts to enforce such contracts is always founded in general principles of public policy which the defendant may take the advantage of, contrary to the real justice of the case, as between the parties, plaintiff and defendant. It is the duty of all courts to keep their eyes steadily upon the interests of the public, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance to it in *foro civili.*"

Again, on page 376, the Court, after properly stating the law that contracts to prevent competition and bidding for public work are contrary to public policy (and citing practically all of the authorities relied upon by appellant in this case) then distinguishes in principle the law applicable to cases where the facts are similar to the case at bar, as follows:

> "It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid.
>
> This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain alone in his individual capacity is not within the rule, although in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves, as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together, not only to secure the contract. but to enable them, if thus obtained, to complete it without financial embarrassment or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations, if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner, the Courts should never

> hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim 'in *pari delicto*' applies."

Now, we pause to ask the Court, in the light of this clear statement of the law, is there anything in the contract before us, or surrounding the contract showing any fraudulent purpose? Is there anything disclosed that shows that Hegness and Chilberg were not acting honestly and in good faith? Wherein does it show that any illegal means or improper or deceptive influences and methods were used to procure this mail contract? We contend that there is no better authority than this opinion of Judge Hawley, subsequently affirmed by the Supreme Court of the United States.

The law frowns on contracts of the following character:

(a) An agreement not to bid.

(b) An agreement to withdraw a bid.

(c) An agreement for a contingent compensation to obtain a contract on a bid.

(d) An agreement for a compensation for refraining from bidding.

(e) An agreement to submit deceptive bids, etc.

(f) An agreement based on collusive bids.

A careful reading of the authorities cited by appellant in his brief brings each case within one of the foregoing kinds of contracts. They all fall within the same category and come within the principle of law applied to the facts in *Hoffman v. McMullen*, supra. They are all based upon fraud upon the public.

Chilberg and Hegness, by uniting their efforts, had no intention, expressed or otherwise, of preventing open competition, nor did they unite to compel the Government to pay a higher amount for the mail contract, but, as the record shows, they united their efforts in a partnership to secure the contract and to carry it out with the Government, neither alone being able to obtain the contract or carry it out. By the fact that they did unite, the Government was furnished a responsible bidder, which it would not have obtained otherwise.

Judge Hawley, in *Hoffman v. McMullen,* supra, page 380, says:

> "The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement, which neither in its purpose, effect nor natural tendency is to prevent a fair competition, it can be and should be enforced, but where there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the

> necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when disclosed, will be stamped with marks of disapproval in any court of law or of equity."

Again, on page 381, Judge Hawley says, in speaking of the validity of the contract:

> "Its validity is tested, not by its results, but by its objects, as shown by its terms."

Nowhere in the agreement is any purpose or intent expressed to keep Chilberg's interest in the mail contract secret, nor was there ever any such intention. On the contrary, the record shows that, notwithstanding Hegness's mistake or neglect to state in the application blank required by the postal regulations, the record discloses that the postoffice officials at all times were aware of Chilberg's interest, and that there was no deception or fraud of any character.

A careful reading of *Atcheson v. Mallon,* supra, so thoroughly relied upon by appellant, places it within the general class of cases to prevent competitive bids. In its effect it was quite like Hoffman v. McMullen. As remarked by Mr. Justice Peckham, of the Supreme Court, affirming *Hoffman v. McMullen*, as follows, in referring to *Atcheson v. Mallon:*

> "Which in its nature is a case very similar to the one now before us",

and again in the same case referring to that character of cases, says:

> "The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement."

The cases of

Gulick v. Ward, 10 N. J. Law, 87;
Atcheson v. Mallon, supra;
Hunter v. Pfeiffer, 9 N. E. 124;
King v. Winants, 71 N. C. 469,

and others cited and relied on by appellant, have no application whatever to the facts in this record, and are not authority or in point in any way whatever under the view that we take, but only aid the Court in distinguishing the difference between such cases under the facts in each case from the principle enunciated by Judge Hawley applicable to the facts similar to the case at bar.

The case of *Atcheson v. Mallon* was based upon the authority of *Gulick v. Ward,* supra. The New York Court subsequently, in *Marsh v. Russell,* 66 N. Y. 288, by Mr. Justice Earl, distinguishes the two lines of cases and reviews the principles enunciated in *Gulick v. Ward,* supra, and *Atcheson v. Mallon,* supra, and other similar cases, and clearly distinguishes and approves as the true rule the principles enunciated in *Phippen v. Stickney,* 3 Met. 384, quoting the language of Mr. Justice Dewey as follows:

> "When such an agreement is made for the purpose and with a view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for

> sale below the fair market value, it will be illegal and may be avoided as between the parties as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties and for a reasonable and honest purpose, such agreement will be valid and binding."

In this case the New York Court quite clearly distinguishes the case of *Atcheson v. Mallon,* and quite clearly reconciles that case with the doctrine enunciated in *Breslin v. Brown,* 15 Am. Rep. 627.

Appellant cites Cyc. as an authority. So do we. See 9th Cyc., page 492, note 81, where Cyc. clearly distinguishes the rule:

> "On familiar principles, an agreement that one shall bid for several for a public contract is not illegal *per se",* citing
>
> *Bellows v. Russell,* 51 Am. Dec. 238;
>
> *Breslin v. Brown,* supra;
>
> *Flanders v. Wood,* 18 S. W. 572, and other cases.

Again Cyc. says:

> "And generally an honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although in a certain sense, and to a limited degree, such co-operation might have a tendency to lessen competition."
>
> *Gibbs v. Smith,* 115 Mass. 592;
>
> *Lawnin v. Bradley,* 13 Mo. App. 361;
>
> *Cocks v. Izard,* 7 Wallace, 559;
>
> *Hoffman v. McMullen,* supra;

In *Gibbs v. Smith,* supra, the Court, in drawing the line of decisions in an analagous case, said:

> "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the parties offering it, and, therefore, illegal."

Citing also

Lawnin v. Bradley, supra, and
Cocks v. Izard, supra.

Counsel for appellant contends that the lower Court fell into error in applying the principles of *Breslin v. Brown* to the facts of this case, and says, "*Breslin v. Brown* cannot be considered as an authority."

Well, again we call the Court's attention to the language of Judge Hawley in *Hoffman v. McMullen* at page 380, in distinguishing and announcing how far *Breslin v. Brown* can be relied upon as authority:

> "*Breslin v. Brown* * * * is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improve-

> ments, that were to be let to the lowest bidder, to enter into an agreement, to become partners in the work in the event that the contract should be awarded to either and that the contract, when awarded should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There, separate and independent bids were filed by the respective parties.
>
> 'The bid of each was based upon his own judgment and filed at his own discretion.'
>
> It did not appear that either had knowledge of the other's bid, and these facts led the Court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid."

In other words, if we understand Judge Hawley correctly, he says in effect that *Breslin v. Brown* was correctly decided as applied to the facts in that case, just as *Breslin v. Brown* is good authority for the facts of the case at bar.

The facts in the case of *Hunter v. Pfeiffer,* supra, were entirely different from the facts now before this Court. The Court in *Hunter v. Pfeiffer,* under the set of facts which clearly showed the agreement was made to stifle bidding, reaffirmed the doctrine of *Atcheson v. Mallon,* and kindred decisions applicable to such set of facts. The Court there saying:

> "The purpose, tendency and necessary effect of such a contract was to stifle fair, open, actual competition, and to perpetrate a fraud upon the public officers."

The case of *Bellows v. Russell,* supra, was a mail contract case and very similar and on all fours with the facts of the case at bar. The contract is set out with the additional facts given that the parties met, and learning that each intended to bid, and had made some preparation, entered into their contract. The Court distinguishes the two lines of authorities so far as then adjudicated, reaffirming the principles of *Doolin v. Ward,* 6 Johns. 194, and *Wilbur v. Howe,* 8 Johns. 444, and then cites and quotes with approval Mr. Justice Dewey in *Phippen v. Stickney,* supra, holding that under the facts the contract was not illegal or against public policy. The Court reasoned the same as the New York Court in *Marsh v. Russell,* supra, wherein Mr. Justice Earl reviewed *Gulick v. Ward* and *Atcheson v. Mallon* relied upon by appellant herein.

In *Breslin v. Brown,* supra, the Court, after admitting the rule to be that any agreement entered into for the purpose of preventing or stifling competition is against public policy, refers to the case of *Atcheson v. Mallon* and distinguishes the rule of the exception by quoting from *Phippen v. Stickney,* supra, as follows:

> "The extent to which the doctrine of invalidating such contracts can safely be carried would rather seem to include within the rule all cases of fraudulent acts and combinations having for their object to stifle fair competition at biddings, with the design of becoming the purchasers at a price less than the fair value

> of the property. Beyond this, the application of the principle contended for may be found productive of mischief, and an unwarranted interference with the course of business at auction sales."

The lower Court in the case at bar in its able and instructive opinion (Tr. page 61) in commenting on the contract in dispute in this action made the following finding of fact:

> "The contract here shows on its face nothing more or less than an agreement that the parties shall endeavor to obtain a contract for carrying the mail in Alaska, and that they shall divide the net profits upon an agreed percentage basis, after the objects of the contract are completed, and after the money due on same is paid by the United States. There is no suggestion of a purpose to lessen the bids, nor is that the effect or tendency of the contract."

We repeat that we are unable to see how this Court could come to any other finding from reading the contract than that arrived at by the lower Court as above expressed. Quite a number of the cases cited by counsel in his brief are ably distinguished in the opinion of the lower Court, and it would be useless for us to attempt to further discuss them other than to call this Court's attention and express the hope that this Court will read the opinion of the lower Court with the same interest that we did.

Among the cases discussed and distinguished are the following:

> *King v. Winants,* 17 Am. Rep., page 11;
> *Tool Co. v. Norris,* 2 Wallace 45;

Meguire v. Corwine, 101 U. S. 108;
McConaghy v. Clark, 77 Pac. 1084;
Marshall v. B. & O. R. R., 14 Howard 314;
Trist v. Child, 21 Wallace 441;
Hobbs v. MacLean, 117 U. S. 567;
Northern Pacific Lumber Co. v. Spore, 75 Pac. 890;
Dulaney v. Scudder, 94 Fed. 6.

Counsel for appellant offers about ten pages of argument and endeavors in his brief to convince the Court that the contract in dispute was a lobbying contract. The ridiculous observation is made that because Chilberg was to receive eighty-five per cent of the net profits, that the Court should assume that Chilberg was to spend a portion of this percentage in lobbying the contract from the postal authorities. The question of whether or not the agreement was inequitable in its division of profits can only come before the Court on an accounting and can only come up for consideration and determination when the case is heard on its merits.

Feather v. Palm Bros., 133 Fed. 466;
Fleming v. Lee, 109 Fed. 953;
Meehan v. Valentine, 145 U. S. 611.

See also extensive and elaborate note of

Cudahy Packing Co. v. Hybon, 18 L. R. A. 981.

Referring to sections of Revised Statutes cited by appellant, the Court in *Hobbs v. McLean,* supra (page 576), says:

> "They were passed in order that the Government might not be harassed by multiplying the numbers of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

See also

U. S. v. Gillis, 95 U. S. 407;
Erwin v. U. S., 97 U. S. 392;
Goodman v. Niblack, 102 U. S. 556;
St. Paul & D. R. Co. v. U. S., 112 U. S. 733.

It is certainly asking the Court to go a long way to infer and guess how Chilberg intended to spend his share of the profits of the contract, in view of the fact that there is nothing in the agreement that intimates that anything fraudulent was to be done with the money.

We cite the Court to the note to *Houlton v. Dunn,* 30 L. R. A. 737, wherein the rule applicable to contracts known as contingent or lobbying contracts is clearly expressed.

It seems to us like a waste of time and labor to discuss or ask the Court to consider appellant's contention that this agreement was an assignment of the contract, or an assignment of a claim against the United States, and, therefore, in violation of the Revised Statutes prohibiting assignments; but on this point we ask the Court to consider the case of *Hobbs v. McLean,* supra.

There is absolutely no similarity of facts in the case at bar with the case of *Spofford v. Kirk,* 97 U. S. 484, and the other cases relied upon by appellant.

See also

Northern Pacific Lumber Co. v. Spore, supra;
Dulaney v. Scudder, supra.

In conclusion we submit the contract is a partnership *inter sese* entered into for the following purposes:

(a) To obtain the mail contract;

(b) To provide the means of performing it;

(c) To divide the net profits after the Government has paid over the money.

With this interpretation of the contract, we submit the Court should affirm the orders of the lower Court in enjoining the appellant from dissipating the partnership funds pending the final hearing of the case on its merits.

The conduct of the appellant in appropriating from the partnership funds the sum of twenty-four hundred dollars and refusing to apply the postal warrants to the indebtedness of the partnership certainly demands the equitable interposition of the Court and the injunctional order as well as the receivership were both necessary and proper.

See

High on Receivers, page 492, Section 760 et seq.

We submit in conclusion the Court should affirm the orders of the lower Court and allow the cause to be tried on its merits.

Respectfully submitted,

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